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In The
Supreme Court of the United States
October Term, 1991

BATH IRON WORKS CORPORATION and
COMMERCIAL UNION INSURANCE COMPANIES,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The First Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Should benefits for loss of hearing sought by retired workers under the Longshore and Harbor Workers' Compensation Act be awarded under 33 U.S.C. § 908(c)(13), which governs claims for loss of hearing, or under 33 U.S.C. § 908(c)(23), which governs claims by retirees?

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¹ All parties to the proceeding below appear in the caption of the case with the exception of the employee, Mr. Ernest C. Brown. Bath Iron Works is a Maine corporation whose common stock is owned by Fulcrum II, a New York partnership, and Prudential Insurance Company of America.

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OPINIONS BELOW

The decree of the First Circuit Court of Appeals dated August 27, 1991 and reported at *Bath Iron Works v. Director, OWCP*, 942 F.2d 811 (1st Cir. 1991) appears as an appendix to the Petition for a Writ of Certiorari at App. 1. The Decision and Order *En Banc* of the Benefits Review Board dated November 26, 1990 and cited at 24 BRBS 89 (1991) is reproduced at App. 21. The unreported Decision and Order of the Administrative Law Judge dated October 3, 1988 is reproduced at App. 31.

GROUND ON WHICH JURISDICTION WAS INVOKED

The decree of the First Circuit Court of Appeals was entered on August 27, 1991 (App. 1). The Petition for a Writ of Certiorari was filed on November 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Longshore and Harbor Workers' Compensation Act at issue concern benefits for loss of hearing, benefits for retirees and time of injury. They appear as an appendix to the Petition for Writ of Certiorari beginning at App. 48, and they include the following:

33 U.S.C. §902(10)

33 U.S.C. §908(c)(1-13, 21, 23)

33 U.S.C. §910(d)(2)

33 U.S.C. §910(i).

STATEMENT OF THE CASE

Mr. Ernest C. Brown (hereinafter "Employee" or "Mr. Brown") was exposed to loud noise while working as a riveter and chipper for Bath Iron Works (hereinafter "BIW" or "Employer") in Bath, Maine (App. 33). He worked from 1939 until 1947 and again from 1950 until he voluntarily retired in 1972 (*Id.*).

On September 20, 1985, Mr. Brown filed a claim for permanent partial disability under the Longshore and Harbor Workers' Compensation Act (hereinafter "the Act" or "the LHWCA"). He alleged a binaural loss of hearing caused by occupational noise.

An Administrative Law Judge with the Department of Labor (herein "the ALJ") held on October 3, 1988 that Mr. Brown's "time of injury" under 33 U.S.C. §910(i) was the date in 1985 on which he received an audiogram, but that compensation was payable under 33 U.S.C. §908(c)(13) (App. 37, 40).

BIW appealed to the Benefits Review Board of the Department of Labor (hereinafter "Board"). The Respondent, Director of the Office of Workers' Compensation Programs of the Department of Labor (hereinafter "Director"), participated in the appeal.

The Board affirmed the ALJ on November 26, 1990, but two of its five members wrote separately to express the opinion that benefits should be calculated under 33

U.S.C. §908(c)(23), which governs claims by retirees, rather than under §908(c)(13), which governs claims for loss of hearing (App. 27-30). The Board rejected the Director's argument that the "time of injury" occurred when Mr. Brown retired in 1972 (App. 24).

BIW filed a Petition for Review with the First Circuit Court of Appeals. The First Circuit affirmed the Board's holding that compensation was payable under §908(c)(13), but disagreed with its reasoning. The Court accepted the Director's argument that the "time of injury" occurred in 1972 and that §908(c)(23) was therefore not applicable (App. 19).

BIW filed a Petition for a Writ of Certiorari on November 25, 1991. The Petition was granted by this Court on March 23, 1992.

SUMMARY OF THE ARGUMENT

The LHWCA provides that a worker with an occupational loss of hearing may receive compensation for that permanent partial disability under 33 U.S.C. §908(c)(13). However, in early 1984, the Board *denied* a hearing loss claim filed by a retiree since a voluntary retiree cannot demonstrate a loss of wage earning capacity. The Board cited an earlier decision in which it denied a retiree's claim for benefits based upon asbestosis.

These decisions prompted Congress to include within the Act's 1984 Amendments a limited benefit for voluntary retirees whose occupational diseases become manifest after retirement. The First Circuit, however, held that

the Amendments do not apply to claims for loss of hearing because loss of hearing is not "an occupational disease which does not immediately result in death or disability" under §910(i). Admittedly, if §910(i) does not apply, then benefits must be calculated under §908(c)(13) rather than §903(c)(23).

The First Circuit's decision, however, is wrong for two reasons. First, a compensable loss of hearing often does and in this case did include age-related hearing loss or presbycusis, which does *not* immediately result from exposure to loud noise. Therefore, §910(i) *does* apply. Second, the construction of the statute urged by BIW and accepted by the Fifth and Eleventh Circuits carries out Congress's intent as demonstrated by the language of the statute and its legislative history. Therefore, if §910(i) is ambiguous, it should be construed in a manner consistent with Congress's intent to compensate all retirees under §908(c)(23) for diseases that become "manifest" after retirement.

ARGUMENT

1. Introduction.

The LHWCA was enacted by Congress in 1927 to compensate maritime workers for "disability"² caused by

² 33 U.S.C. §902(10) defines "disability" as follows:

"(10) 'Disability' means incapacity because of injury to earn the wages which the employee was
(Continued on following page)

work. See *Fleetwood v. Newport News Shipbuilding & Dry Dock*, 776 F.2d 1225, 1226-27 (5th Cir. 1985); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 103 S. Ct. 634 (1983). The Act provides that an employee who is permanently and totally disabled shall receive a weekly benefit equal to two-thirds of his average weekly wage. 33 U.S.C. §908(a). It allows a like benefit for the duration of any *temporary* total disability. 33 U.S.C. §908(b). It also allows a proportionate benefit for temporary *partial* disability. 33 U.S.C. §908(e).

At issue in this case is compensation for disability that is permanent, but partial, in nature. This variety of compensation is payable in addition to benefits for temporary disability. 33 U.S.C. §908(c).

The Act includes three "systems" for compensating disability that is permanent, but partial. Many injured body parts are specifically listed or "scheduled" under 33 U.S.C. §908(c)(1-20). Benefits in these cases are calculated based upon a specified number of weeks of compensation. However, these awards do not require proof of actual wage earning incapacity. *Potomac Elec. Power Co. v. Director, Etc.*, 449 U.S. 268, 269, 101 S. Ct. 509 (1980). This

(Continued from previous page)

receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 10(d)(2)".

system of "scheduled" benefits was labeled by the First Circuit as "system one".

For example, compensation for loss of use of an arm is presumed to equal 312 weeks of compensation. 33 U.S.C. §908(c)(1). Total loss of hearing is worth 200 weeks. 33 U.S.C. §908(c)(13). The actual award equals two-thirds of the employee's average weekly wage times the percent of loss times the scheduled number of weeks. 33 U.S.C. §908(c). In a hypothetical claim for loss of hearing, two-thirds of a \$300 average weekly wage (\$200) times 50 percent loss of hearing times 200 weeks equals a single payment of \$20,000.

Compensation for loss of use of body parts not "scheduled" is calculated as a function of actual lost wage earning capacity. 33 U.S.C. §908(c)(21). Back injuries are a common example. Another example, under what the First Circuit described as "system two", is occupational disease other than hearing loss. This is because hearing loss is the only occupational disease that is "scheduled". 33 U.S.C. §908(c)(13).

A third "system" was added by Congress in 1984 after the Board declined to compensate retirees for permanent partial disability since they are by definition unable to demonstrate a loss of wage earning capacity. These provisions include 33 U.S.C. §§910(d)(2), 910(i), 908(c)(23) and portions of §902(10). They award compensation based upon two-thirds of the retiree's average weekly wage (or the national average if the employee retired more than one year before), times a percentage of whole body permanent impairment under the American

Medical Association Guidelines, payable weekly for the duration of the impairment.

For example, the same 50 percent loss of hearing is equal to an 18 percent whole body impairment under the American Medical Association Guidelines. 18 percent of two-thirds of a \$300 average weekly wage equals \$36 per week, or \$1,872 per year. Whether this or any other employee would fare better with a "scheduled" award or a "retiree" award depends upon how long he lives and, if he retired more than one year before, whether the national average weekly wage is more or less than his average weekly wage.

If 33 U.S.C. §908(c)(23) applies, then it does so *notwithstanding* §908(c)(13).³ §908(c)(23) applies if the average weekly wage is determined under §910(d)(2). The average weekly wage is determined under §910(d)(2) if the "time of injury" defined at §910(i) occurs after retirement. The "time of injury" under §910(i) is the date on which the employee becomes or should become aware of the relationship between his employment and his

³ 33 U.S.C. §908(c)(23) reads as follows:

"(23) Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 10(d)(2), the compensation shall be 66 2/3 per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under the guides referred to in section 2(10), payable during the continuance of such impairment".

disability – but only for claims “due to an occupational disease which does not immediately result in death or disability.”

2. The Problem.

The legislative history to the 1984 Amendments and the statutory language itself suggest on their surfaces that Congress intended that claims for loss of hearing be governed by the “retiree” provisions. The legislative history refers to a hearing loss claim submitted by a retiree and the “retiree” statute itself, 33 U.S.C. §908(c)(23), expressly applies *notwithstanding* 33 U.S.C. §908(c)(13), which governs all other claims for hearing loss.

However, 33 U.S.C. §908(c)(23) applies only to claims described under §910(i) as being for “occupational disease which does not immediately result in death or disability”. It is true that, on the one hand, occupational loss of hearing is immediate because it does not progress following exposure to noise. However, on the other hand, an employee’s hearing often worsens after retirement until it becomes “manifest” to the employee.

The problem is whether this language mandates that a retiree’s claim for loss of hearing falls outside the scope of §910(i) despite §908(c)(23) and its legislative history.

3. Three Solutions to the Problem.

a. The Board’s Solution.

Interestingly enough, this problem has spawned three different solutions. The Board has consistently held

that a retiree’s “time of injury” for purposes of asserting a hearing loss claim is his post-retirement date of awareness under 33 U.S.C. §910(i), but that a single lump sum benefit must be calculated and paid under 33 U.S.C. §908(c)(13) rather than weekly payments under 33 U.S.C. §908(c)(23). *Machado v. General Dynamics Corporation*, 22 BRBS 176 (1989); *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989); *Gulley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 262 (1989). However, this “hybrid” solution has been rejected by the First, Fifth and Eleventh Circuits, as well as by BIW and the Director. This is because if §910(i) applies, then §§910(d)(2) and 908(c)(23) must apply under the express terms of the statute.

b. The First Circuit’s Solution.

The Director has routinely submitted that occupational hearing loss, unlike asbestosis, *does* immediately result in disability and that §910(i) is therefore inapplicable.⁴ If this is so, then the doors to §§910(d)(2) and 908(c)(23) are closed while that to §908(c)(13) remains open. Thus, the Director submits (and the First Circuit agrees) that the Board consistently applies the right provision, §908(c)(13), for the wrong reason.

⁴ The Court’s owe deference to official expressions of policy by the Director, who does administer the statute, but settled law precludes them from affording deference to an agency’s litigating position. *Alabama Dry Dock and Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 1563 (11th Cir. 1991).

c. The Fifth and Eleventh Circuits' Solution.

In *Ingalls Shipbuilding v. Director, OWCP*, 898 F.2d 1088 (5th Cir. 1990), the Fifth Circuit reversed *Gulley* and *Fairley*. The Court agreed with the Board that the "time of injury" is the date of awareness under 33 U.S.C. §910(i). However, the Fifth Circuit held that the plain language of §908(c)(23) requires that weekly benefits be paid under 33 U.S.C. §908(c)(23). The Court observed that the issue was whether Congress intended to distinguish between hearing loss and other occupational diseases since hearing loss is the only occupational disease that is "scheduled" under the Act. *Id.* at 1092.

The Court reviewed the legislative history to the 1984 amendments and concluded that Congress intended to create a *single scheme* for *all retirees* regardless of the occupational disease at issue. *Id.* at 1094. While the employee argued that the statute's plain language would lead to an absurd result, the Fifth Circuit confirmed that such inequities, whether real, perceived or fact specific, are the business of Congress rather than the Courts:

" * * * Congress was clearly free to compensate retirees at a different rate than active employees. We may not change the statutory scheme to avoid what the Commissioner argues is an inequitable result in this case."

Id. at 1094.

The Director's argument was also rejected by the Eleventh Circuit in *Alabama Dry Dock and Shipbuilding Corp. v. Sowell*, 933 F.2d 1561 (11th Cir. 1991). The Eleventh Circuit agreed that, for purposes of fixing compensation in hearing loss cases, the "time of injury" occurs

when the employee becomes aware of the relationship between the employment and the disease. *Id.* at 1568. The Court concluded from the statute and its legislative history that §910(i) does *not* reflect a Congressional intent to distinguish hearing loss from other occupational diseases with respect to "time of injury". *Id.*

4. Reasoning of Fifth and Eleventh Circuits is More Persuasive.

a. First Circuit Erred in Accepting Misleading Representations Concerning Hearing Loss.

The Director represented to the First Circuit that occupational hearing loss is not like asbestosis because it does not progress once an employee is removed from occupational noise.⁵ The First Circuit accepted that representation since it was not disputed by any party (App. 12). The Court then concluded that, since hearing loss *does* immediately result in disability, §910(i) is inapplicable (App. 12).

However, while the *occupational* portion of an employee's hearing loss may not change after retirement, a retiree's hearing may still worsen because of age or presbycusis⁶. See R. Sataloff and J.T. Sataloff, *Occupational Hearing Loss* 32, 201, 374, 592 (1987). This distinction is

⁵ The Director cited R. Sataloff and J.T. Sataloff, *Occupational Hearing Loss* 357 (1987).

⁶ "Presbycusis" is defined as "loss of ability to perceive or discriminate sounds as a part of the aging process; the pattern and age of onset may vary". *Stedman's Medical Dictionary* 1135 (24th ed. 1982).

critical because retirees are "routinely" compensated for presbycusis as much as for noise-induced hearing losses. See *Labbe v. Bath Iron Works Corporation*, 24 BRBS 159, 162 (1991).⁷ Indeed, as a practical matter, retirees such as Mr. Brown often delay filing their claims until after retirement not because of ignorance or neglect, but because they don't notice a loss of hearing until post-retirement presbycusis causes that loss to reach a threshold level.

This pattern is no more evident than in the present case. Mr. Brown underwent an audiogram on December 29, 1954 which revealed a 40.6 percent binaural loss of hearing (App. 42). He underwent four additional audiograms following his 1972 retirement; on March 15, 1977, April 17, 1978, December 22, 1983 and August 11, 1986 (App. 34). Dr. Peter Haughwout offered *unrebutted* testimony that Mr. Brown's loss of hearing *progressed* after the 1977 audiogram because of presbycusis (Depo. Dr. Haughwout, p. 8). Indeed, the ALJ found as fact that the compensable 82.4 percent loss of hearing that existed in 1983 resulted from loud noise *as well as from presbycusis* (App. 34-35). Mr. Brown was therefore compensated for a *cumulative* loss of hearing that included presbycusis, and

⁷ Many states, including Maine, address this problem by deducting from an employee's loss of hearing one-half decibel for each year of age over 40 to account for the average annual loss to presbycusis experienced by the average worker. 39 M.R.S.A. §193(7); 1B A. Larson, *Workmens' Compensation Law* §41.54 (1991).

not just for the occupational loss of hearing that existed in 1972.⁸

b. The First Circuit's Decision Contravenes Congress's Intent.

It is evident that what the First Circuit perceived as a clear medico-legal distinction is anything but that. However, if the language in §910(i) is ambiguous, Congress's intent was not.

That Congress intended 33 U.S.C. §908(c)(23) to apply to hearing loss claims is amply demonstrated by the legislative history to the 1984 Amendments. At the very least, Congress did *not* intend that a distinction be drawn between hearing loss and other occupational diseases.

The legislative history confirms that Congress sought to remedy an inequity described just months before in *Aduddell v. Owens-Corning Fiberglass*, 16 BRBS 131 (1984). That case, one of first impression for the Board, involved a claim for asbestosis asserted by an employee who voluntarily retired prior to the manifestation of his disease. The Board denied the claim since the retired employee could not demonstrate a loss of wage earning capacity.

⁸ Contrary to the First Circuit's finding (App. 12), the Board did *not* concede that Mr. Brown's 84 [sic, 82.4] percent loss of hearing existed in 1972. The Board simply observed that the ALJ found an 82.4 percent hearing loss without reference to a date (App. 22). In fact, as noted by the ALJ, the 82.4 percent figure resulted from an audiogram performed on December 22, 1983 (App. 37).

Three weeks later, the Board denied a retiree's claim for hearing loss. In *Redick v. Bethlehem Steel Corporation*, 16 BRBS 155, 157 (1984), the Board cited *Aduddell* for the proposition that,

"[w]here a worker voluntarily and permanently retires for reasons unrelated to his injury prior to manifestation of his injury, he has no disability regardless of whether his injury is to a part of the body covered by the schedule".

Both of these cases were specifically cited by Senator Orrin G. Hatch,⁹ who reported to Congress as follows on September 20, 1984:

" * * * in conference, a series of controversial rulings at the agency level came to the attention of the conferees. In *Abuddell* (sic, *Aduddell*) v. *Owens-Corning Fiberglas* (sic), 16 BRBS 131 (Feb. 28, 1984), the Benefits Review Board denied compensation benefits to a worker who had manifested an occupational disease - asbestosis - after permanently retiring from the work force. The Board viewed the retiree as, by definition, being without a wage-earning capacity. Therefore the disease could not diminish that capacity for purposes of computing compensation. An identical result was reached in *Redick v. Bethlehem Steel Corporation*, 16 BRBS 155 (Mar. 20, 1984). Similarly, in *Worrell v. Newport News Shipbuilding and Dry Dock Company*, 16 BRBS (ALJ) 216 (Mar. 15, 1983), an administrative law

⁹ Senator Hatch served as one of three Managers on the Part of the Senate with respect to the 1984 Amendments and was a co-sponsor of the bill that was ultimately approved by Congress.

judge ruled that a widow was not entitled to death benefits where her retired husband died from mesothelioma. * * * .

"The conferees concluded that these interpretations of the Longshore Act did not represent equitable policy. A person's eligibility for compensation should not necessarily be dependent upon the fortuity of when he becomes disabled * * * .

"The conference substitute therefore makes express provision for the payment of benefits to retirees who become disabled during retirement as a result of an occupational disease * * * ."

130 Cong. Rec. 26,300 (1984) (statement of Senator Hatch).

These remarks confirm that Congress did intend to include within the "retiree" amendments claims for loss of hearing such as that filed by Mr. Redick. See, e.g., *Director, OWCP v. Perini North River Associates*, *supra*, 459 U.S. at 321. (Congressional intent indicated by legislative reports that identify decisions Congress intended to overrule by Amendments to LHWCA).

The First Circuit, however, chose to dismiss Senator Hatch's reference to *Redick* because (1) perhaps Mr. Redick's symptoms became manifest *after* retirement contrary to the Court's understanding of occupational hearing loss or (2) the holding in *Redick* was "simply wrong" since this Court has held that claims for "scheduled" injuries must be allowed regardless of whether the employee's earning capacity has been impaired. *Potomac Elec. Power Co. v. Director, etc.*, *supra* (App. 15-17).¹⁰ However, the First

¹⁰ Significantly, this case did *not* involve a claim by a retiree.

Circuit's belief that the *Redick* decision was wrong is beside the point. What matters is that Senator Hatch and Congress contemplated that hearing loss claims would fall within the scope of the "retiree" amendments.

The Director, of course, submits that this Court need look no farther than the words "occupational disease which does not immediately result in disability or death" to judge the intent of Congress. However, as noted, this language is replete with ambiguity. For instance, must *all* of the disability be immediate? All of the *claimed* disability? What of conditions that worsen with time? These ambiguities make it impossible to follow this Court's admonition that, in construing the LHWCA, "the wisest course is to adhere closely to what Congress has written". See, e.g., *Washington Metro. Transit Auth. v. Johnson*, 467 U.S. 925, 104 S. Ct. 2827 (1984).

Fortunately, the legislative history sheds additional light on exactly what Congress meant by §910(i). That history confirms that Congress was concerned not with diseases that do not immediately result in any disability in terms of pathology, but ones that do not immediately become "manifest" in terms of the statute.

Congress's concern with "manifestation" is evidenced in the House and Senate Managers Statement of Managers, which discussed the compromise bill that became law. The statement confirms that,

"the conferees agree to a definition of 'disability' in section 2(10) with respect to a case in which an occupational disease manifests itself subsequent to the claimant's date of retirement".

H.R. Conf. Rep. No. 1027, 98th Cong. 2nd Sess. 30, reprinted in 1984 U.S. Code Cong. and Admin. News 2771, 2779.

Thereafter, the House Conference Report confirms that the final bill was intended to assure eligible victims of compensation regardless of when a disease *manifests* itself and that a claimant is given one year from *manifestation* in which to provide notice. 130 Cong. Rec. H9730, H9735 (daily ed. Sept. 18, 1984) (remarks of Reps. Miller and Erlenborn). Representative Miller emphasized that,

"[b]y choosing the period of manifestation, the conferees clearly reject the date of last exposure to an injurious substance as the time of injury. Manifestation, in the context of these 1984 amendments, means that time when the employee or claimant becomes aware, or * * * should have been aware, of the relationship between the employment, the disease, and the death or disability.

"In determining benefits for occupational disease victims, S. 38 again looks to the manifestation date, not the date of last exposure. We recognize that an active worker may become ill before becoming eligible for compensation, as in the case of asbestos-related plaques, without suffering an immediate loss of wages. In those cases, the clock would not begin to run on the notice or filing statutes of limitation, until an actual wage loss was suffered. Nor in general would we look to the wage at the onset of the illness, but rather the wage immediately prior to wage loss in determining benefit levels. * * *

"The conference report also assures that a claimant whose disease manifest itself subsequent to retirement will not be denied benefits. * * *".

Id.

Finally, Senator Hatch made reference to post-retirement *manifestation* in a Senate Report:

"The second issue addressed with respect to occupational disease is whether retirees, or their survivors, should be entitled to compensation where the disease does not manifest itself until after retirement".

130 Cong. Rec. 26,300 (1984).

It therefore appears that Congress intended that the words "occupational disease which does not immediately result in disability or death" mean disease that does not immediately manifest itself. "Manifestation", in turn, is easily defined. It is defined in a medical dictionary as "[i]n medicine, the display or disclosure of characteristic signs or symptoms of an illness".¹¹ A law dictionary defines "manifest" as "[e]vident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident, and self-evident."¹² That this concept has been a part of the Act since its inception was underscored by Judge Learned Hand in an early decision construing the LHWCA:

¹¹ *Stedman's Medical Dictionary* 832 (24th ed. 1982).

¹² *Black's Law Dictionary* 867 (5th ed. 1979).

"The statute is not concerned with pathology, but with industrial disability; and a disease is no disease until it manifests itself."

Grain Handling Co. v. Sweeney, 102 F.2d 464 (2d Cir. 1939), cert. den. 308 U.S. 570, 60 S. Ct. 83.

Thus, while the Director may argue that noise causes immediate disability, even the Director would concede that hearing loss does not always become *manifest* until after retirement. The foregoing legislative history lends ample support to the conclusion that the "time of injury" under §910(i) is the time of actual or constructive awareness of employment-related disability for claims involving occupational diseases including those for loss of hearing. This Court should construe the Act so as to carry out the intent of Congress, as evidenced by the statute's language and its legislative history. See, e.g., *Director, OWCP v. Perini North River Associates*, *supra*.

CONCLUSION

In sum, Congress did *not* intend to draw a distinction based upon forensic medicine between claims for diseases that progress as a function of exposure and those that are latent until after retirement. On the contrary, Congress specifically intended that claims for loss of hearing be subject to the "retiree" amendments. This intent is evident from both the statutory language at §908(c)(23) and the legislative history of the 1984 Amendments. To the extent that §910(i) is ambiguous, such ambiguity should be resolved so as to carry out the intent of Congress.

For the foregoing reasons, BIW respectfully requests that the decree issued by the First Circuit be reversed and that the matter be remanded to calculate benefits under §908(c)(23).

Respectfully submitted,

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